

[Cite as *Witkowski v. Ford Motor Co.*, 2016-Ohio-5634.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104256

KEITH R. WITKOWSKI

PLAINTIFF-APPELLANT

vs.

FORD MOTOR CO., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Parma Municipal Court
Case No. 15 CIV 03587

BEFORE: Blackmon, J., Jones, A.J., and McCormack, J.

RELEASED AND JOURNALIZED: September 1, 2016

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PATRICIA ANN BLACKMON, J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Plaintiff Keith Witkowski (“Witkowski”) appeals from the trial court’s journal entry granting judgment in favor of defendant Ford Motor Company (“Ford”) in this breach of warranty case. Witkowski assigns the following errors for our review:

I. The trial court improperly affirmed the magistrate’s finding that Witkowski’s claims were governed exclusively by the Ohio Lemon Law, ORC 1345.71 to 1345.78.

II. The trial court improperly affirmed the magistrate’s finding that Witkowski’s warranty claim was time barred by 1345.75(C).

III. The trial court erred by failing to apply ORC 1302.98 and the four year statute of limitations from discovery provided by 1302.98(C) to Witkowski’s warranty claims against Ford Motor.

IV. The trial court improperly held that Witkowski failed to meet his burden of proof of establishing by a preponderance of the evidence the defect in the transmission existed during the warranty period.

V. The trial court improperly held that the lack of evidence of negligence by Ford precluded a finding that it breached the contractual extended warranty.

{¶2} Having reviewed the record and pertinent law, we affirm the municipal court’s judgment. The apposite facts follow.

{¶3} On July 6, 2009, Witkowski purchased a new Mercury Mariner (“the Mariner”) from Witt Lincoln Mercury (“Witt”) in California. The Mariner came with a

new vehicle limited warranty (“the Warranty”), under which the transmission was covered for five years or 60,000 miles, whichever came first. The Warranty reads in pertinent part as follows: Ford “will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship.”

{¶4} On August 15, 2009, Witkowski took the Mariner back to Witt complaining that when the vehicle accelerates too quickly, it “has a stumble before it catches and goes.” Witt “verified” Witkowski’s concern, but concluded that “this is a normal characteristic of this vehicle. Vehicle is equipped with electronic throttle control. ETC is not as initially responsive as throttle cable. Condition is normal.”

{¶5} Witkowski took the Mariner back to Witt on September 10, 2009, January 11, 2010, July 2, 2010, January 17, 2012, July 16, 2013, and June 21, 2014. On all of these occasions, Witkowski complained of various Warranty issues regarding the Mariner. For some of the issues, Witt performed Warranty work on the vehicle, including replacing the tailgate latch and correcting a problem with the check engine light. When Witkowski complained of a “rattling” noise from the rear of the vehicle, Witt “found aftermarket license plate frame causing concern” and removed it. For other issues, Witt concluded that “after thorough inspection we could not duplicate or locate a defect that is causing your concern.” As to Witkowski’s complaint that when shifting,

the transmission had a “lag time” or “jerked,” Witt consistently concluded that the Mariner’s transmission “worked properly at this time.”

{¶6} Witkowski moved to Ohio, and on August 17, 2015, he took the Mariner to Liberty Ford in Maple Heights, again complaining that the vehicle would accelerate “heavy.” At the time, Witkowski had owned the Mariner for just over six years and put approximately 69,000 miles on the Mariner. Liberty’s assessment of Witkowski’s complaint stated, in part, as follows: “Roadtested vehicle. After vehicle warmed up, verified concern. Found when accelerating, vehicle would slip. * * * Found overdrive slipping. Prepared preliminary estimate for valve body, and clutches. Trans would need to be removed and disassembled to verify. Cust declined at this time.”

{¶7} According to Witkowski, Ford denied his claim regarding the Mariner’s transmission under the Warranty. On August 27, 2015, Witkowski had the Mariner’s transmission replaced at State Road Transmission, Inc. The invoice for the work stated that “5th gear bad in Trans — needed overhauled. Replace transmission.” Witkowski paid \$3,024 for the transmission and \$165.41 for a rental car.

{¶8} On November 13, 2015, Witkowski filed this small claims case against Ford alleging breach of warranty. The court held a hearing on December 15, 2015, at which Witkowski testified that he:

was having drivability issues with [the Mariner] where the car would stumble through the gears, it would basically rev high and then bang into gear when I was shifting it from park to drive or reverse to drive it would do the same thing. * * * Ford * * * verified the concern, [and] basically told me that it was just the way the car drove. They attributed it to the electronic throttle body at the time but did not have any remedy or any

repair available. They just sent me on my way. Throughout another five or six appointments I expressed the same concern the same drivability issues. * * * I continued to have the same problems. It wasn't until I was out of the warranty period * * * [that Liberty] told me through their diagnostic that the transmission needed to be replaced or rebuilt.

{¶9} On cross-examination, Witkowski testified that Ford should extend the Warranty period to cover his transmission claim, “because they came up with other remedies to fix that problem later on. * * * [I] asserted claims for the warranty problems a number of times under warranty and * * * this is just a reassertion of those original claims so it should extend to the period.” In Witkowski’s opinion, “if you assert a claim under warranty and then the problem is identified and fixed afterward, * * * that should extend the warranty for that repair.”

{¶10} Asked if, at any time, Witt told him there was anything wrong with the Mariner, Witkowski stated, “No, they said it was fine. * * * There was no problem based on Ford’s analysis of it.” Witkowski testified that, during the Warranty period, he did not get an “independent assessment” of the Mariner’s transmission to show that Ford was “wrong.” According to Witkowski, Liberty told him that “the diagnostic to identify the transmission problem hadn’t been developed until after” the Warranty expired.

{¶11} On December 16, 2015, the magistrate issued a decision in favor of Ford, finding that Witkowski “failed to prove by a preponderance of the evidence the allegations in the Complaint.” Specifically, the magistrate found that “the warranty in this case is limited by its terms to a finite period of years and miles. In the absence of bad faith * * * on the part of the guarantor it does not extend the term. Clearly there was

no bad faith demonstrated by Ford * * * or their dealers in the evidence presented in this matter.”

{¶12} The magistrate also noted that, although Witkowski did not include a “Lemon Law” claim in his complaint pursuant to R.C. 1345.71 through 1345.78, if he had, it would have been barred by the five-year statute of limitations.

{¶13} Witkowski objected to the magistrate’s decision, raising two issues. First, that “the magistrate has improperly relied upon and applied the statute of limitations for Ohio Lemon Law claims,” and second, that “the magistrate’s finding that there is no evidence Ford acted in bad faith is irrelevant to the validity and timeliness” of his claim.

{¶14} On March 3, 2016, the court overruled Witkowski’s objections and adopted the magistrate’s decision. The court concluded that Witkowski failed to show evidence that the Mariner’s “transmission was defective prior to replacement.”

In every instance, [Ford’s] agent serviced the transmission to the limit of their then diagnostic skill. The fact that diagnostic equipment may have improved at a later time identifying a problem with the transmission does not mean that Ford was negligent or breached its warranty contract; rather, they did that which they were able to do on each presentation of the vehicle within the limits of their ability to diagnose and fix a problem. The Court also finds that even though the replacement was necessary as shown by the evidence, there is also the possibility that some issues with the transmission

may have occurred over the five years and 69,000 miles of the driving of the vehicle.

{¶15} It is from this order that Witkowski appeals.

Standard of Review

Objections to Magistrate's Decision in Small Claims Court

{¶16} We review proceedings in small claims court under an abuse of discretion standard. *Video Discovery, Inc. v. Passov*, 8th Dist. Cuyahoga No. 86445, 2006-Ohio-1070. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶17} Pursuant to Civ.R. 53(D)(3)(a), a “party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion [in a magistrate’s decision] unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).” In the case at hand, Witkowski filed two objections to the magistrate’s decision — first, regarding the Lemon Law statute of limitations and second, regarding the lack of evidence that Ford acted in bad faith.

{¶18} We note that, other than concerning the standard of review, Witkowski has cited no law to support any of his five assigned errors. This court need not address claims that are unsupported by citations to statutory or case law. App.R. 16(A)(7);

App.R. 12(A)(2); *State v. Wellington*, 8th Dist. Cuyahoga Nos. 100867, 100869, and 100870, 2014-Ohio-4473. Nonetheless, we review Witkowski’s appeal on its merits.

Lemon Law

{¶19} Witkowski argues that the court improperly found that his claims were “governed exclusively by the Ohio Lemon Law” and, in turn, barred by its statute of limitations. In general, Ohio’s Lemon Law, which is codified in R.C. 1345.71 et seq., “was designed to give a purchaser greater leverage in seeking redress when his or her new auto turns out to be a ‘lemon.’” *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, 816 N.E.2d 1061, ¶ 13.

{¶20} We need not review R.C. 1345.71 et seq., in detail, because neither the magistrate nor the judge found that Witkowski’s claims were governed exclusively by Ohio’s Lemon Law. The magistrate’s decision notes, in what amounts to dicta, that, “although the issue was not raised at trial,” R.C. 1345.75 provides that Lemon Law claims must be brought “within five years of the date of original delivery of the motor vehicle.” The magistrate further noted that the statute of limitations for Lemon Law claims regarding the Mariner ran in July 2014. Likewise, the court noted in its journal entry adopting the magistrate’s decision that, “[a]lthough not plead by Plaintiff, the Court also agrees with the Magistrate’s Proposed Decision in that the time to file an action under Lemon Law has passed.”

{¶21} Both the magistrate’s decision and the court’s journal entry found in favor of Ford based on Witkowski’s failure to prove his breach of warranty claim. Witkowski

did not make, and the court did not rule on, a Lemon Law claim. Accordingly, Witkowski's first and second assigned errors are overruled.

Breach of Warranty

{¶22} “To establish a claim for breach of express warranty under Ohio law, a plaintiff must show that: (1) a warranty existed; (2) the product failed to perform as warranted; (3) plaintiff provided the defendant with reasonable notice of the defect; and (4) plaintiff suffered injury as a result of the defect.” *Caterpillar Fin. Servs. Corp. v. Harold Tatum & Son's, Ents.*, 4th Dist. Ross No. 14CA3449, 2015-Ohio-4884, ¶ 11.

{¶23} Witkowski's third and fourth assigned errors were not preserved on appeal, because he did not object to the magistrate's decision regarding these issues. Nonetheless, in the interests of justice, we review the arguments Witkowski raised, albeit out of order.

{¶24} In Witkowski's fourth assigned error, he essentially argues that he presented sufficient evidence to show that Ford breached the Warranty.

{¶25} In the case at hand, the Mariner's Warranty was expired when Ford denied Witkowski's claim in 2015. As the Warranty was not in existence, Witkowski failed to produce evidence regarding the first prong of the test.

{¶26} Witkowski also failed the second prong of the test, because there is no evidence that the Mariner did not perform as warranted during the Warranty period. Although expert testimony is not necessary to establish a manufacturer's defect in a breach of warranty case, the plaintiff must present evidence of a “defect or condition that

substantially impairs the use, value, or safety of a motor vehicle to the consumer and does not conform to the express warranty of the manufacturer or distributor.” R.C. 1345.71(E).

{¶27} Witkowski’s evidence showed that he complained of transmission problems, but that Ford found none. Indeed, the evidence showed that, in Ford’s opinion, the transmission was working properly during the Warranty period. In *Miller v. Daimler Chrysler Motors Corp.*, 8th Dist. Cuyahoga No. 78300, 2001 Ohio App. LEXIS 2450 (May 31, 2001), this court held that evidence that

the vehicle makes an intermittent groaning or grinding noise while executing a turn and the steering column vibrates, without evidence of any functional impairment, did not, in itself, prove that the vehicle contained a defect or malfunction. Something more was needed to connect that symptom to a defect in material, workman-ship or factory preparation covered by the warranty.

{¶28} In the case at hand, Witkowski testified that the Mariner had a “transmission problem,” but there is no evidence that the car did not function as intended under the Warranty. In fact, Witkowski drove the car for six years and 69,000 miles before Liberty and State Road Transmission recommended replacing the transmission. Neither recommendation attributed the transmission issues to a manufacturing defect that existed during the Warranty period.

{¶29} Accordingly, the court did not abuse its discretion in finding that Witkowski failed to present evidence that Ford breached the Warranty, and Witkowski’s fourth assigned error is overruled.

{¶30} In his third assigned error, Witkowski alleges that the court erred by failing to apply the statute of limitations and tolling provisions found in R.C. 1302.98, which concerns the Uniform Commercial Code for sales contracts. Pursuant to R.C. 1302.98(A), a breach of any contract for sale claim must be commenced within four years after the cause of action accrues. Pursuant to R.C. 1302.98(B), “[a] breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.”

{¶31} Witkowski argues that his breach of warranty claim was not discovered, and did not begin to accrue until 2015, when Liberty told him the Mariner’s transmission needed to be replaced. However, Witkowski alleges on appeal that “[t]here is no dispute that the defective transmission was timely reported under the warranty,” which expired in 2014. According to Witkowski, he “established through his testimony and the Mariner’s maintenance records that the warranty breach existed and was reported to Ford Motor within the Extended Warranty period.” Witkowski’s positions are inconsistent. He claims that “the warranty breach existed and was reported to Ford” while the Warranty was in place, yet he asks this court to toll the statute of limitations because the breach of warranty was not discovered until after the Warranty expired. Upon review, we find nothing in the record suggests that the statute of limitations should be tolled. Accordingly, Witkowski’s third assigned error is overruled.

{¶32} In Witkowski’s fifth assigned error, he argues that the court “improperly held that the lack of evidence of negligence¹ by Ford precluded a finding that it breached the contractual extended warranty.” Witkowski further argues in his brief that “evidence of negligence is not required in establishing a breach of the warranty.” Although Witkowski’s statement is correct, it is unclear how this allegedly amounts to error by the court. The court did not hold that Witkowski’s breach of warranty claim failed because of the lack of evidence of negligence. The court stated in its journal entry that subsequent improvements in diagnostic equipment was not evidence that Ford was “negligent or breached its warranty contract * * *.” Witkowski appears to have misinterpreted the court’s journal entry, and his fifth assigned error is overruled.

{¶33} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Parma Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

¹Witkowski objected to the magistrate’s decision based on lack of evidence of bad faith; however, Witkowski’s argument on appeal concerns lack of evidence of negligence. Legally, bad faith and negligence are separate and distinct concepts. “The term ‘bad faith’ generally implies something more than bad judgment or negligence.” *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 81. Thus, Witkowski failed to preserve his fifth assigned error for appeal. Nonetheless, we review this argument on its merits.

PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., A.J., and
TIM McCORMACK, J., CONCUR